

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

74-1388

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

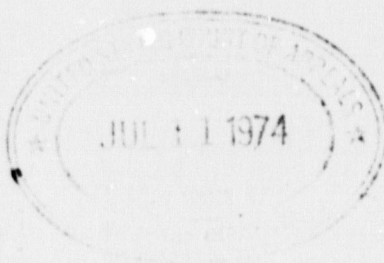
-against-

CIRO RODRIGUEZ CALANA,

Defendant-Appellant.

*On Appeal From The United States District
Court For The Southern District Of New York*

APPELLANT'S BRIEF



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TABLE OF STATUTES AND CASES

1. 21 U. S. C. A. 173 and 174
2. 26 U. S. C. 4701, 4703, 4704(a), 4771(a) and 7237(s)
3. *Comprehensive Drug Abuse Prevention and Control Act of 1970-101, 1103 a*
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STATEMENT OF ISSUES

Appellant contends that the verdict of the jury; which found him guilty of counts 1 and 2 of the Indictment was contrary to the weight of evidence and that the Government did not establish that the defendant was a member of the overall conspiracy alleged in the First Count of the Indictment and the possession in the Second Count of the Indictment.

STATEMENT OF ISSUES

Ciro Rodriguez Calana, Defendant-Appellant hereinafter for purposes of clarity referred to as Appellant was indicted during the month of October 1973, and a superseding indictment was filed prior to trial on February 20, 1974. He and others were charged with a violation of Section 173 and 174 of Title 21, United States Code, and Sections 4701, 4703, 4704 (a), 4771 (a) and 7237(a) of Title 26, United States Code; to wit: Importation into the United States, large quantities of narcotic drugs and sell and facilitate the transportation, concealment and sale of large quantities of narcotic drugs; of the said narcotic drugs had been imported and brought into the United States contrary to law.

Appellant is the husband of Francesca Ortega Rodriguez, and the brother-in-law of Raul Ortega Alvarez; who were also indicted with him.

The trial of this indictment herein commenced on February 20th 1974; before Judge Charles Metzner and the verdict of the jury was rendered on March 20th 1974.

Appellant was found guilty of Counts 1 and 2 of the Indictment, his wife was acquitted and his brother-in-law was convicted too.

Appellant was sentenced to six (6) years on each Count, to run concurrently and appellant appeals from the verdict of the jury and the sentence imposed on him.

POINT 1

THE GOVERNMENT DIDNOT ESTABLISH THAT THE DEFENDANT WAS A MEMBER OR PARTICIPANT OF THE CONSPIRACY ALLEGED IN THE FIRST COUNT OF THE INDICTMENT.

The Government presented two witnesses that testified concerning appellants membership or participation in the conspiracy and his possession of the contraband. They were Miguel Rodriguez and Romero Gonzalez.

Miguel Rodriguez testified in direct examination . . . "I went to that apartment during the month of April--March, April and May. And those incidents took place during those months. But in this moment it is impossible for me to remember the dates." (Page 117 of the testimony). The gist of Miguels testimony was that the Appellant was present during the cutting of heroin and when his brother-in-law showed Miguel Rodriguez a suit case that contained heroin. The aforementioned incidents allgedly occurred at 38 Rankin Street, Elizabeth, New Jersey.

During cross-examination Miguel Rodriguez was asked the following questions about Appellants involvement with heroin and the sale of it. Miguel Rodriguez stated" Appellant never purchased heroin from him and he never gave money to the Appellant (Page 379 of the testimony). Father, Miguel Rodriguez could not give testimony as to specific dates and times of the day that the alleged meetings occurred at Appellants home. The witness conceded that there were times that he vistited Appellants home and Appellant was not present; because appellant was working. (Page 381 of the testimony).

When Romero González was testifying during cross-examination (Pgs. 1037-1045) he stated " I saw Mrs. Calana on March 12th 1970 in her home (38 Rankin Street) between 7:00 to 8:00 A.M. in the morning. He added I don't remember. I always saw them there".

However, on redirect examination, pursuant to a conference with the Assistant U.S. Attorney, Romero Gonzalez, was shown that it was impossible for Mrs. Calana, to be present in her home because she reported to work at 5:40 A.M. on March 12th, 1970 (Pgs. 1334 and 1335 of the testimony) The testimony presented by the Government was ineffectual to prove that Appellant was a party to conspiracy.

In *United States v. Butler* 494 2d 1246 (1974), the Court held " Mere knowledge, approval of or acquiescence in, the object and purpose of conspiracy without an agreement to cooperate in achieving such object or purpose does not make a party to a conspiracy. To sustain conspiracy conviction, evidence when reviewed in its entirety must generate more than mere suspicion of guilt and where evidence is equally consistent with both guilt and innocence conviction cannot be sustained.

The Appellant was neither an importer or a buyer. He was merely the relative by marriage of Raoul Ortega Alvarez and he was never arrested or convicted of a crime before this indictment. Whether the appellant knew his or his brother-in-law / friends engaged in criminal activities would be conjecture

or surmise. The Government witnesses testified that they visited 38 Rankin Street; however there were times that they were working or not at home. Even if the appellant permitted his brother-in-law to bring individuals to his home, in his absence, that would be no proof of his agreement to join the conspiracy. An accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined the agreement.

In *United States v. Falcone*, 109 2d 579 the Court speaking of the actions of a conspirator stated. . . . "in prosecutions for conspiracy or abetting, his attitude toward the forbidden undertaking must be more positive. It is not enough that he does not forego a normal lawful activity, of the fruits of which he knows that the others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome". Here, there was no proof that appellant received money or any other consideration.

Further appellant was linked to the conspiracy; because he was a Cuban National..

POINT II

THE GOVERNMENT FAILED TO PROVE CIRO RODRIGUEZ CALANA HAD ACTUAL OR CONSTRUCTIVE POSSESSION OF ANY HEROIN.

Witnesses testified for the Government that Raoul Ortega Alvarez, kept a suitcase at 38 Rankin Street, Elizabeth, N. J. that contained heroin. Title 21, U. S. C. Section 174 requires that the Government prove beyond a reasonable doubt that the heroin was illegally imported and that Appellant knew the heroin was illegally imported. There was conflicting testimony as to the times and dates of meetings at 38 Rankin Street. Further, it was established the Appellant was gainfully employed during some of the dates conspiracy and meetings at his home. In fact, it was established that his wife was at work when one of the Government witnesses stated that she was present during a meeting of the conspirators.

In United States v. Horton 488 F 2d 374, the issue of constructive possession was examined by the Court, and it stated " Evidence, though demonstrating defendants proximity to illegal substance and to person who did have control over heroin, was insufficient to sustain conviction of possession with intent to distribute where it did not establish any type of working relationship between parties regarding heroin; but merely on association. Here, Appellants brother-in-law visited the New York Metropolitan region on several occasions, during the course of the alleged conspiracy and did not visit Appellant or his wife. Assuming that Appellants brother-in-law did have heroin in the

suitcase, it does not follow that Appellant knew or could exercise dominion or control.

In United States v. Jones 308F. 2d 26 the Court said " As for the record discloses, defendant did nothing more than introduce a willing buyer to a willing seller and to serve as a go-between until such time as the willing seller and willing buyer were satisfied to do business with each other. "
Appellant does not fall within the category created by the Jones case, he was merely extending hospitality to a brother-in-law and did not act as agent for his brother-in-law. The one specific date that Appellant was alleged to have possessed the heroin according to the testimony of the Government's witness, it was the Appellant's wife was at work and her time cards from work were introduced into evidence at the trial. The Government witnesses could not testify that the Appellant profited from any of the transactions that they testified about.

POINT III

THE SENTENCE IMPOSED UPON CIRO RODRIGUEZ CALANA WAS EXCESSIVE AND VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Appellant was sentenced to two six years terms to run concurrently; by Judge Charles H. Metzner. Appellant was not arrested or convicted of a crime; before this incident. Further, Appellant was gainfully employed prior to his indictment; except for seasonal unemployment. The narcotic offenses of which the defendant was convicted were within the purview of the Comprehensive Drug Abuse Prevention and Control Act of 1970-sec. 101 et seq. 1103 (a), 21 U.S.C.A. sec. 801 et seq. In *United States v. Bradley* 455 F. 2d 1181 (1972), Justice Douglas, dissenting stated "The correct interpretation of the word "prosecutions" as used in sec. 1103 (A) of the 1970 Act, was, in my view the one given by the Court of Appeals of the Ninth Circuit in *United States v. Stephens*, 449F.2d 103, 1053.

" Prosecution ends with Judgment. The purpose of the section has been served when judgment under the old Act has been entered and abatement of proceedings has been avoided. At that point litigation has ended and Appeal is available. *Korematsu v. United States*, 319 U.S. 432, 63 S at 1124, 87 L. E. D. 1997 (1943). What occurs thereafter-the manner in which judgment is carried out, executed or satisfied, and whether or not it is suspended in no way affects the prosecution of the case..... The instant case is not of that proportion but it does

entail the resolution of unspoken assumptions--those favoring the status quo, of prison systems as apposed to those who see real rehabilitation as the only cure of the present prison crisis".

The sentence of imprisonment of the Appellant is cruel and unusual punishment; because of his prior background and the tenuous link between him and his brother-in-law Raoul Ortega.

CONCLUSION

The verdict of the jury should be set aside and the indictment dismissed against the appellant and that the Court grant any further relief as it deems proper.

Respectfully submitted,

HUDSON H. REID

AFFIDAVIT OF PERSONAL SERVICE

**STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:**

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of July . 19 74 at No. Foley Square, N.Y.C. deponent served the within *BRIEF* upon U.S. Atty. for Southern Dist. of N.Y. the Appellee herein, by delivering a true copy thereof to *him* personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 11 day of July 1974

William Bailey
.....

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1975

Edward Bailey
.....
Edward Bailey